In the

Supreme Court of the United

OCTOBER TERM, 19[illegible]

MRS. LIZZIE B. HOOD, et al.,

Petitioners,

v.

THE TEXAS COMPANY,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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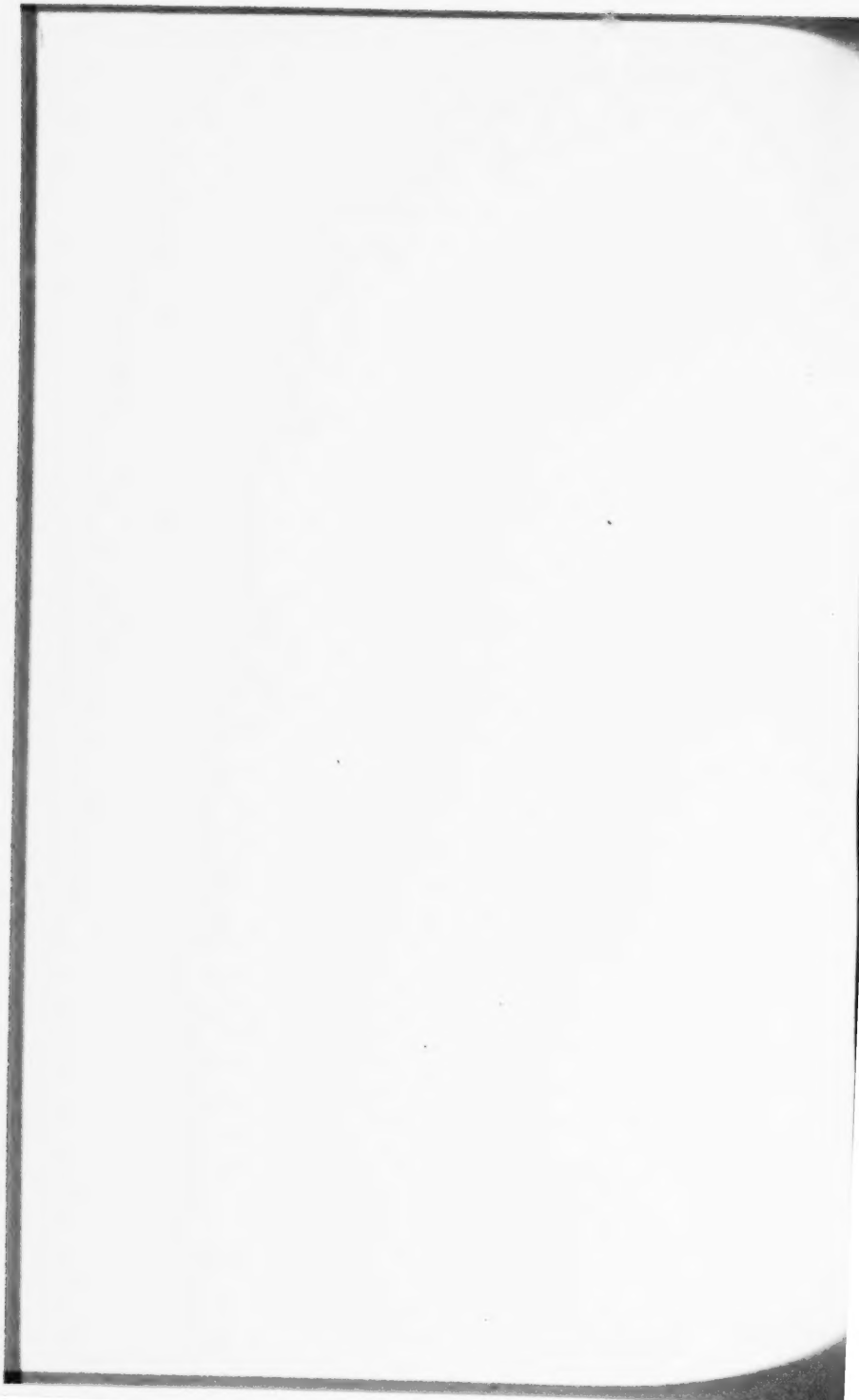

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I.
STATEMENT OF CASE

Respondent here adopts the statement of this case as given by the Honorable Circuit Court of Appeals for the Fifth Circuit in its opinion. (R. 262-264.)

II.
SUMMARY OF THE ARGUMENT

POINT ONE

The petition for writ of certiorari presents no valid reason based upon the record in this case meriting the granting of this writ because (a) the local law of Texas is con-

trolling in this case and there is no federal law or federal question involved in its determination; (b) this case, being governed by the applicable law of Texas, was decided by the Honorable Circuit Court of Appeals for the Fifth Circuit in accordance therewith in the accepted and usual course of judicial proceedings.

(a) This suit is purely a common law action for negligence. The Federal jurisdiction of this cause exists solely on the basis of diversity of citizenship of the parties and said suit does not involve any Federal question or law. The sole question at issue is whether or not petitioners made a submissible case for the jury, which question the Honorable Circuit Court of Appeals for the Fifth Circuit rightly answered in the negative basing its decision on the well settled law of Texas and which law controls the decision in this case.

(b) Since this case is governed by the applicable law of Texas the Honorable Circuit Court of Appeals for the Fifth Circuit correctly applied well settled state law in reaching its decision that petitioners had not presented a submissible case for the jury. Petitioners presented no direct evidence as to any negligence on the part of respondent. They relied solely upon the delineation of witnesses as to physical findings observed after the collision. These observations including a description of the damage to both vehicles as being on the respective left side of each, the location of the vehicles after the accident as being some sixty to two hundred feet apart, a description of debris scattered along the center line of the highway, an oil spot and a dent in the

pavement which dent the overwhelming testimony shows to have been on respondent's side of the road. From these stated observations alone it is impossible to arrive at any intelligent or reasonable conclusion as to the point of accident on the highway such observations being equally consistent with conflicting hypotheses, leaving the jury to the purest conjecture and surmise and requiring the piling of presumption on presumption in arriving at any conclusion at all. This is not permissible. Moreover respondent introduced direct, disinterested, positive, unequivocal and uncontradicted eye witness testimony affirmatively showing this accident occurred on *respondent's side of the road* and such evidence destroyed any conflicting inferences and was conclusive of such matter under the clearly established law in Texas which law this Honroable Court has likewise approved.

III.
ARGUMENT

POINT ONE—(Restated)

The petition for writ of certiorari presents no valid reason based upon the record in this case meriting the granting of this writ because (a) the local law of Texas is controlling in this case and there is no federal law or federal question involved in its determination; (b) this case, being governed by the applicable law of Texas, was decided by the Honorable Circuit Court of Appeals for the Fifth Circuit in accordance therewith in the accepted and usual course of judicial proceedings.

DISCUSSION

Petitioners' asserted reasons for the allowance of this writ of certiorari appear on Pages 10 and 11 of their petition.

It is of course recognized that the granting of this writ rests within the sound judicial discretion of this Honorable Court but certainly this record does not indicate any basis for the *character of reasons* that this Honorable Court has stated it will consider in exercising its discretion. Supreme Court Rule 38 Sub-paragraph 5 (a) through (c).

THE LOCAL LAW OF TEXAS IS CONTROLLING IN THIS CASE AND THERE IS NO FEDERAL LAW OR FEDERAL QUESTION INVOLVED IN ITS DETERMINATION.

This suit is simply a common law action for negligence allegedly causing the death of petitioners' decedent.

The jurisdiction of the Federal Court in this case is based *solely* upon diversity of citizenship. (R. 16.) This Honorable Court has definitely held that in cases in which jurisdiction depends upon diversity of citizenship the substantive rights of the parties are to be determined by the local applicable law. *Erie Ry. v. Tompkins, 304 U. S. 64; 58 Sup. Crt. 817; 82 L. Ed. 1188.* Whether or not a plaintiff has made a submissible case for the jury is, therefore, determined by the law of the state where the suit is brought. See *Stoner v. N. Y. Life Ins. Co., 311 U. S. 464; 61 Sup. Crt. 336; 85 L. Ed. 284.*

Since the determinative question in the instant case *is* simply whether or not the petitioners made a submissible case for the jury, its decision falls within the realm of Texas law. The Honorable Circuit Court of Appeals for the Fifth Circuit, applying the well settled law of Texas, rightly held petitioners had not so done. (R. 262.)

Tennant v. Peoria & P. U. Ry. Co., 64 S. Ct. 408, 321 U. S. 29; Lavender v. Kurn, et al., 66 S. Ct. 740, 327 U. S. 645; Myers v. Reading Co., 67 S. Ct. 1334; Tiller v. Atlantic Coastline R. Co., 318 U. S. 54, 63 S. Ct. 444; Highfill v. Louisville & Nashville R. Co. 154 Fed. (2d) 874; Griswold v. Gardner, 155 Fed. (2d) 333 cited by petitioners, are cases involving the Federal Employers' Liability Act and are not applicable to this case. As stated by this Honorable Court in *Ellis v. U. P. Ry. Co., 67 Sup. Ct. 598, 91 L. Ed. 433 at page 435*, in discussing the standards of liability under this act "whether these standards are satisfied is a Federal question, the rights created being Federal rights." The early case of *T. & P. Ry. Co. v. Cox, 145 U. S. 594; 12 Sup. Crt. 905* cited by petitioners does not assist them and certainly presents no conflict with the instant case. This Honorable Court in such case held that jurisdiction of the Federal Court existed because the suit was one "arising under the constitution and laws of the United States." The Supreme Court in this decision specifically stated that the Circuit Court applied well settled principles of law in disposing of the case without describing such principles. A contention was made that the defendant should have been granted an instructed verdict and this Honorable Court properly stated that "the bill of exceptions does not purport to contain all

the evidence, and it would be improper to hold that the court should have directed a verdict for defendants for want of that which may have existed."

The case of *Melville v. State of Maryland, et al., Circuit Court of Appeals Fourth Circuit, 155 Fed. (2d) 440* cited by petitioners clearly bears out the stated rule that in ascertaining the rights of the parties in this case the law of Texas controls. This case was also a death case and involved a collision between two trucks. The occupants were killed and there were no eye witnesses who testified (parenthetically we may add this is one of the facts distinguishing this case from the *Hood case)*. The *Melville case* was removed to a Federal Court in Maryland and upon appeal to the Circuit Court, Circuit Judge Dobie said:

> "It is conceded that we must here follow the law of Maryland."

THIS CASE, BEING GOVERNED BY THE APPLICABLE LAW OF TEXAS, WAS DECIDED BY THE HONORABLE CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT IN ACCORDANCE THEREWITH IN THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS.

In keeping with settled principles of law in Texas as enunciated by the Honorable Circuit Court of Appeals for the Fifth Circuit in this case, petitioners simply failed to introduce any testimony of probative nature that warranted the submission of the case to the jury.

It is well settled law in Texas that the mere happening of an accident is no evidence at all of negligence. *Phillips*

v. Citizens National Bank, Tex. Com. App., 15 S. W. (2d) 550; Rankin v. Nash-Texas Company, 129 Tex. 396; 105 S. W. (2d) 195; Davis v. Castile (Com. App.), 257 S. W. 870. Petitioners' evidence did not go beyond mere proof of an accident.

Although petitioners alleged some five acts of negligence on the part of respondent (R. 2-9) no probative evidence was introduced to support any of them.

Testimony was introduced relative to the *position of the two vehicles* after the accident and as the Circuit Court concisely stated "the position of the truck of the defendant after the accident was variously placed at from 60 to 200 feet or more from the point of impact, from which plaintiff's counsel also insists that the inference should be drawn that the truck was traveling at an excessive rate of speed." (R. 263.)

The court then justly held that "the circumstance that the truck may have been 200 feet or more from the point of collision is without any significance in view of the undisputed fact that upon the collision the driver was thrown out of the truck and it was, therefore, without a driver to guide it or bring it to a halt, no imputation of excessive speed can be drawn from this circumstance in the light of undisputed testimony." (R. 264.)

Petitioners introduced no evidence at all as to the speed of the truck belonging to respondent. The occupants of the truck, Stanley Johnson, H. C. Partain and W. L. Minor, placed the speed of the truck at between 30 and 40 miles per hour. (R. 148, 162 and 173.)

In *Schumacher et al. v. MoPac (Tex. C. C. A.), 116 S. W. (2d) 1136* the defendant's vehicle came to a stop on the wrong side of the highway and 132 feet from the place of collision. The court said that such facts were not sufficient to warrant a jury finding of negligence against either party or of a finding of proximate cause.

Respondent submits that certainly speed could not as a matter of law have been a proximate cause of the collision if both vehicles had been traveling on their respective sides.

The testimony as to the damage to the two vehicles showed it to be confined to the respective left side of each vehicle. Petitioners' Witness Frank Jackson testified to damage on the left side of the automobile stating that the entire left side was torn out. (R. 69.) With respect to the damage to the truck Jackson testified that the *left side* of the truck was damaged. (R. 69.) The bed of the truck stuck out some eight or ten inches beyond the cab (R. 70) and there were marks on the left side of the truck. (R. 70.) It was his opinion that the part of the cab that stuck out, struck the car near the top on the left side up near the steering wheel. (R. 89.)

Does the given fact of damages to both vehicles being confined to their respective left sides present any probative fact as to what *point on the highway* they came together? The question seems to answer itself. Respondent submits it to be axiomatic that the damages occasioned the two vehicles could have just as surely happened on the north side of the highway (respondent's side) as on the south side (petitioners' side). To allow the jury to determine which

side of the road the accident happened on from the damages resulting to the two vehicles is to permit them to indulge in pure speculation and conjecture. This is not permissible. *Joske v. Irvine, 91 Tex. 574, 44 S. W. 1059; Stokes v. Burlington Rock Island R. Co. (Ct. Civ. App.), 165 S. W. (2d) 229. (Error refused.)*

There was testimony relative to a dent in the pavement, an oil spot and other debris. Petitioners' Witness Jackson testified that there was grease and dirt "right about, very near the center stripe. The big amount of the dirt and grease and stuff that dropped off, what I judged dropped off the car, was right near the center stripe. *Possibly some of it might have been just a little over*, but most of it was on the south side of the highway the way the road is running there." (R. 66.) (Italics ours.) He further stated debris seemed to be scattered promiscuously right down about the center line, "possibly some on either side." (R. 73.)

In regard to an alleged oil spot, petitioners' Witness Jackson on cross examination testified:

> "Q. In other words, that is the point of the contact of the oil, the main body that was dumped out, from six to twelve inches. Is that right?
>
> "A. I would say within six inches of the center line.
>
> "Q. Now, as a matter of fact, the wheels of the automobile could have been across the center line and that oil been just exactly where you say it was, couldn't it?
>
> "A. You want me to say whether it could have been that way or not?
>
> "Q. Yes.
>
> "A. It is possible." (R. 86.)

Respondent's witnesses Sheriff Nolan Maynard (R. 113-114), Deputy Sheriff O. C. Akard (R. 127), Justice of the Peace W. H. Bell (R. 133) and neighboring farmer Bob Palmer (R. 140) all testified at the designated portions of the record that there was a hole in the pavement on the respondent's side of the center line of the highway. Petitioners' Witness Jackson testified to finding a hole on the south side of the pavement or petitioners' decedent's side of the road. (R. 66 and 81.) He did not undertake to tell *where* it was located on the south side. When asked "do you have an opinion as to what part of the left side of the Hood car made that hole" he answered "no I do not." (R. 83.)

Thus we have the situation of debris existing on both sides of the center of the road. Witness Jackson eliminates the oil spot from consideration when he testified as stated above that it could have been where he says he found it and the wheels of the petitioners' decedent's car have been across the center stripe. This testimony is further rendered without probative value whatsoever when it is considered that no testimony was offered with respect to the width of petitioners' decedent's car, whether there was anything to indicate whether the car had been knocked back at the time it dumped its oil or whether on the other hand it dumped the oil the instant it came in contact with the truck, what side of the oil pan it spilled out of or any number of like facts which would be necessary to render such testimony worthy of consideration in determining whether it could be told from the location of the oil spot where the Chevrolet was traveling at the time of the collision. The dent in the pavement most assuredly does not make a case for peti-

tioners because from their testimony it is impossible to tell where the dent testified to by Jackson was actually located. In this connection it is worthy of consideration that Officer Akard testified that petitioners' Witness Jackson talked with him the morning following the accident and admitted that the hole or dent was on the north side (respondent's side) of the slab. (R. 129.) Thus, as concisely stated by the Circuit Court of Appeals for the Fifth Circuit in this instant case "to sustain the plaintiffs' contention it would be necessary to presume: 1. That the dirt and oil came from decedent's automobile; 2. That decedent's automobile was on its side of the center line of the highway when the dirt and oil were knocked from it; 3. That the decedent's car did not turn into the truck; 4. That the driver of defendant's truck was negligent; 5. That the defendant's negligence was the proximate cause of the injury; * * * such pyramiding of inferences is not permissible under the laws of Texas." (R. 266.) The authorities in Texas are many to the effect that a plaintiff is not entitled to have a case submitted to the jury where in order to establish liability on the part of the defendant it becomes necessary that inferences be piled upon other inferences. *Wells v. Tex. Pac. Coal & Oil Co. (Com. App.), 164 S. W. (2d) 660; Community Natural Gas Co. v. Henley (Com. App.), 24 S. W. (2d) 10; Garrett v. Hunt (Com. App.), 283 S. W. 489.* It is equally well established that where evidence tends to support two conflicting hypotheses it supports neither; *Kansas City Sou. Ry. Co. v. Carter (C. C. A. of Texas), 166 S. W. 115 at p. 121 (Par. 8-10); Bonner v. Texas Co. (5th Circuit), 89 Fed (2d) 291 at p. 294* (ap-

plying this settled law of Texas); and that the verdict of a jury can not be reached from conjecture and guess work. *International Travellers Ass'n v. Bettis (Sup. Ct. of Texas), 35 S. W. (2d) 1040; Missouri Pacific R. R. Co. v. Porter (Sup. Ct. Tex.), 11 S. W. 324; Wells v. Tex. & Pac. Coal & Oil (Com. App.), 164 S. W. (2d) 660; Doggett v. Peek (Fifth Circuit), 116 Fed. (2d) 273 (applying this law of Texas.)*

There is yet another compelling reason why petitioners did not make a submissible case for the jury. Such reason is that any inference that might have otherwise been drawn from the circumstances presented was destroyed by the direct, clear, disinterested and unimpeached testimony from the three survivors of this collision. Witnesses Stanley Johnson, H. C. Partain and W. L. Minor gave the only direct and eye witness testimony as to the action of the two vehicles involved *at and immediately prior* to this unfortunate accident. *Stanley Johnson* testified that he was the driver of the respondent's truck involved in the accident; that the accident occurred between six and seven p. m.; all lights including side lights, clearance lights and front lights on the truck were burning (R. 146); as he approached the scene of the accident he was driving between thirty and forty miles per hour (R. 148); he was traveling on his side or the north side of the center marker (R. 148) he saw the Hood car for the first time when it topped the hill in question (R. 150) the car drove up close to him and then whipped into him. (R. 150.) The car was traveling near the center line as it approached the truck (R. 151) when about twenty feet from the truck the car just

whipped into him. (R. 151.) The car was going at a greater speed than he was. (R. 151.) No part of the truck was on or even with the center line. (R. 151.) He did not know what happened after the car and truck came together and did not know anything until he came to himself after being thrown from the cab of the truck.

Witness H. C. Partain testified that he had not worked for respondent since November 28, 1944, the date of the accident. (R. 160.) That he was riding in the front seat of the truck along with Johnson and W. L. Minor. (R. 161.) The truck was traveling about thirty-five miles per hour as they drove toward Cooper. (R. 162.) They were traveling on the north side of the highway and no part of the truck was over the center line immediately before the accident. (R. 162.) The Hood car was from seventy-five to a hundred yards from them when he first saw it. (R. 162.) When he first saw the Hood car it was over the center line and then it pulled back on its own side of the road. When the Hood car got nearer to them its driver pulled over the line and into the truck. (R. 162.) When the Hood car was about twenty feet from the truck it whipped into them. (R. 163.) *Witness W. L. Minor* testified he had not been working for respondent for six or seven months. (R. 162.) He was riding on the right side of the truck seat. (R. 172.) The truck was traveling at about thirty or thirty-five miles per hour as it aproached the place of the accident. (R. 173.) The truck was driving on the right side of the road with no part of it over the center line. (R. 174.) He saw the Hood car for the first time as it topped the hill. (R. 174.) After the Hood car came over the hill it came

over the center marker onto their side of the road and then pulled back to its own side (R. 174) and when about twenty or thirty feet away pulled into respondent's truck. (R. 174.) He did not know what happened after that for he was knocked out. The car was traveling faster than the truck. (R. 176.)

The above testimony is clear, positive and unequivocal as to on whose side of the road this accident happened, the main point at issue. It reveals clearly, positively and unequivocally that the accident *in fact* happened on respondent's side of the road. Such evidence stands *uncontradicted.* Most assuredly the physical facts in and of themselves relied upon by petitioners to establish their case do not contradict this eye witness testimony offered by respondent. It is submitted that under the settled law of Texas as held by the Honorable Circuit Court of Appeals in this case that such presumptions or inferences as relied upon by petitioners cannot stand in the face of the clear, positive, uncontradicted and unequivocal testimony elicited from three surviving eye witnesses to this accident directly revealing the real fact as to the place of collision on the highway, namely, respondent's side of the roadway. *Empire Gas & Fuel v. Muegge (Sup. Crt.), 143 S. W. (2d) 763; Simonds v. Stanolind Oil & Gas Co. (Com. App.), 136 S. W. (2d) 207; Texas Pacific Coal & Oil Co. v. Wells, 151 S. W. (2d) 927 at p. 931 (C. C. A. of Texas), Aff. 164 S. W. (2d) 660; Paris & M. P. Ry. Co. v. Russell (Crt. Civ. App.), 104 S. W. (2d) 650; Carlisle v. City of Waco (Crt. Civ. App.), 56 S. W. (2d) 208; Huntley v. Psimenos (Crt. Civ. App.), 67 S. W. (2d) 350; Wichita Valley Ry. Co. v.*

Fite (Crt. Civ. App.), 78 S. W. (2d) 714; Caliandro v. Texas & P. Ry. Co. (Crt. Civ. App.), 103 S. W. (2d) 439.

In the recent case of *Fordham v. Butane Gas & Equipment Co. (Civ. App. of Texas), 198 S. W. (2d) 607 (writ of error refused, no reversible error)*, the basic question for decision was whether or not there was any evidence in the record to warrant the submission of any issue of fact to the jury. Plaintiff was seeking to show that escaping gas caused the fire in question. The court held that there was no proof sufficient to go to the jury and stated that:

> "Had it been shown by circumstances, or had the evidence warranted presumption, that the fire was or could have been caused by escaping Butane gas, the positive evidence that the Butane gas was cut off at the source at and during the time of the fire, precluded the indulgence of the presumption that gas was escaping, or the overlying presumption that escaping gas caused the fire."

In *Bibby v. Bibby (Texas Civ. App.), 114 S. W. (2d) 284 (writ of error dismissed)*, there was involved the questions of the purpose of and acceptance of a deed. The Bibbys positively testified regarding these matters. The court states:

> "This direct and positive testimony of the three Bibbys is strongly corroborated by various cogent facts and circumstances shown by the evidence.
>
> "It is true the Bibbys were interested witnesses, but under the circumstances the jury could not rightfully arbitrarily reject their testimony in favor of a mere presumption."

Moreover the testimony of eye witnesses Johnson, Partain and Minor to the effect that this accident happened

on respondent's side of the road, or the north side thereof when Mr. Hood suddenly veered into respondent's truck being direct in nature, positive, unequivocal, and uncontradicted by any testimony that could be dignified by the word "evidence," is therefore binding upon the court and jury and must be given conclusive effect. Particularly is this rule true of evidence coming from disinterested witnesses. *Grand Fraternity v. Melton (Sup. Ct. of Texas), 117 S. W. 788; Sterling National Bank & Trust Co. v. Ellis (Civil Appeals of Texas), 75 S. W. (2d) 716, error dismissed,* and cases therein cited. The fact that Witnesses Johnson, Partain and Minor were employees of respondent at the time of the accident, and in the case of Partain and Minor, former employees at the time of this trial, does not make them "interested witnesses." *Pyle v. Phillips, 164 S. W. (2d) 569 (Civil Appeals of Texas); Western Union Telegraph Co. v. Gardner, 278 S. W. 278 (Civil Appeals of Texas), error dismissed.* In this last cited case the court pointed out that:

> "Appellant further complains because the court gave peremptory instructions in a case established by interested witnesses. We cannot allow this contention, for the reason that the witness Kalb is not shown to have been a member of the corporation of Weatherford Crump & Co., but only an employee, and, as far as we know, the rule contended for has never been applied to the evidence of a mere employee of an interested party. This assignment of error is overruled."

However, the above rule of conclusive effect applies as well to clear, positive, direct, unequivocal and uncontra-

dicted testimony even though it does come from an interested witness. *Chesapeake & Ohio Railway Co. v. Martin, 283 U. S. 209, 75 L. Ed. 983, at pages 988-990; Trinity Gravel Co. v. Cranke (Comm. of Appeals of Texas), 282 S. W. 798, 801, par. 5; Thomas & Co. v. Hawthorne (Tex. Civ. App.), 245 S. W. 966, 972, et seq (writ refused); Dunlap v. Wright (Tex. Civ. App.), 280 S. W. 276, 279,* and authorities there cited; *Still v. Stevens (Tex. Civ. App.), 13 S. W. (2d) 956, error dismissed.* This rule announced in the above authorities is, of course, further strengthened when such testimony is, as in this case, affirmatively and directly corroborated by other facts and circumstances elicited from other sources. We refer here particularly to the testimony of Officers Maynard (R. 112-124) and Akard (R. 126-131) Justice of the Peace Bell (R. 132-139), and Bob Palmer (R. 139-146), delineating the physical facts appearing at the scene of the accident, and which testimony directly confirms and corroborates Witnesses Johnson, Partain and Minor. *Simonds v. Stanolind Oil & Gas Co. (Com. of App.), 136 S. W. (2d) 207; Gulf C. & S. F. Ry. v. Leatherbury (Tex. Civ. App.), 259 S. W. 598, at page 604, par. 5, writ of error dismissed; Bibby v. Bibby (Tex. Civ. App.), 114 S. W. (2d) 284, writ of error dismissed.*

The above statement of the law in Texas is likewise in keeping with that enunciated by this Honorable Court in *Penna. Ry. v. Chamberlain, 288 U. S. 233; 77 L. Ed. 819.* In view of the careful and comprehensive statement of the principles of law cited therein which corresponds to the

substantive law of Texas on the points discussed, respondent presents the following excerpts by way of emphasis:

> "This is an action brought by respondent against petitioner to recover for the death of a brakeman, alleged to have been caused by petitioner's negligence.
>
> * * * * *
>
> "The case for respondent rests wholly upon the claim that the fall of deceased was caused by a violent collision of the string of nine cars with the string ridden by deceased. Three employees, riding the nine-car string, testified positively that no such collision occurred.
>
> * * * * *
>
> "There is no direct evidence that in fact the crash was occasioned by a collision of the two strings in question; and it is perfectly clear that no such fact was brought to Bainbridge's attention as a perception of the physical sense of sight or of hearing. At most there was an inference to that effect drawn from observed facts which gave equal support to the opposite inference that the crash was occasioned by the coming together of other strings of cars entirely away from the scene of the accident, or of the two-car string ridden by deceased and the seven-car string immediately ahead of it. We, therefore, have a case belonging to that class of cases where proven facts give equal support to each of two inconsistent inferences; in which event, neither of them being established, judgment, as a matter of law, must go against the party upon whom rests the necessity of sustaining one of these inferences as against the other, before he is entitled to recover.
>
> * * * * *
>
> "And the desired inference is precluded for the further reason that respondent's right of recovery depends upon the existence of a particular fact which must be inferred from proven facts, and this is not permissible in the face of the positive and otherwise

uncontradicted testimony of unimpeached witnesses consistent with the facts actually proved, from which testimony it affirmatively appears that the fact sought to be inferred did not exist. This conclusion results from a consideration of many decisions, of which the following are examples.

* * * * *

"The fact that these witnesses were employees of the petitioner, under the circumstances here disclosed, does not impair this conclusion. Chesapeake &. O R. Co. v. Martin, 283 U. S. 209, 216-220, 75 L. Ed. 983, 987-989, 51 S. Ct. 453."

Petitioners in their brief make a general charge of inconsistencies in the testimony of the three witnesses above referred to of such nature as to render their testimony improbable. Petitioners assert the testimony of the above witnesses is vague as to what happened *after* the collision only, but it is respectfully pointed out that we are concerned here with events transpiring prior to and immediately at the time of impact. No vagueness exists as to this testimony. As a practical matter the asserted vague testimony as to what happened immediately after the collision should lend credence to such witness' testimony wherein they delineate the facts immediately prior to and at the time of the accident when they were in full possession of all their physical and mental faculties.

Petitioner makes the assertion that the driver and occupants of respondent's truck testified that they were traveling at the time of the accident upon their extreme right side of the highway in question (Petition for Writ of Certiorari, p. 4) and hence the accident could not have happened as testified to. Respondent respectfully submits that

these witnesses did not testify that they were on the "extreme right side of the road." Petitioners' witness Stephenson did not profess to know where the accident occurred (R. 92) but stated generally that the highway had ten feet of *flat concrete surface* on each side of the center line and six feet attached to the flat concrete surface had been topped suitable for traffic. (R. 92.) Witness Johnson testified:

> "Q. Was any part of the truck on or even with that center line at the time he hit you?
>
> "A. No, sir.
>
> "Q. Which side was it on?
>
> "A. It was on the north side." (R. 151.)

Witness Partain placed the truck on its own right side of the highway (R. 162) with the *right wheels* of the truck being on the asphalt topping which immediately joined the concrete slab. (R. 162.)

Witness Minor testified that the right-hand wheels of the truck were *close* to the edge of the *pavement*. (R. 174.) On cross examination he was asked this question:

> "Q. Did I understand your statement to be that that truck at the time it collided with the car of Mr. Hood was completely off of the concrete part of the road and over on the shoulder on its right-hand side?
>
> "A. No, sir.
>
> "Q. Where was it, please, sir?
>
> "A. Well, we were on our, on the right side.
>
> "Q. Where were you with reference to the outside edge?

"A. We was pretty close to the right side edge, yes, sir.

"Q. Pretty close to the outside edge?

"A. Yes, sir.

"Q. According to the testimony, there is a six-foot shoulder that is paved adjacent to the concrete *slab*. What part of your truck was on that shoulder, if any at all?

"MR. ARMSTRONG: We object to counsel stating that that is the testimony. That is not the testimony so far as this particular spot is concerned.

"Q. I will stand corrected if it is not.

"THE COURT: You say your truck, right side of it was close to the edge of the right-hand side of the *slab*. (Italics ours.)

"A. Yes, sir, the right.

"Q. Is that the edge of the hard surface you are talking about?

"A. Yes, sir."

Obviously the witness was referring to the *concrete slab*. On redirect examination he was asked the question:

"Q. Was there any part of the truck off of the concrete slab?

"A. Well, I just wouldn't say."

Certainly the opinion in this case rendered by the Honorable Circuit Court of Appeals for the Fifth Circuit is in keeping with the accepted law of this state. A mere reading of the Texas cases cited by petitioner (Petition for Writ of Certiorari, p. 10) as being in conflict with the opinion delivered in this case reveal that in fact no conflict exists.

Houston Ry. Co. v. Runnels, 47 S. W. 971 follows the unquestioned rule that where a fact issue is made by the evidence it must be submitted to the jury. The court found:

> "There was, between the plaintiff and two of the defendant's employees who testified, as positive a conflict as can be produced by opposing affirmative and negative statements." (p. 972.)

The sufficiency of evidence was not even in question in this suit. *Houston E. & W. T. R. Co. v. Boone, 105 Tex. 188, 146 S. W. 533,* recognizes the principles contended for in the instant case in approving the statement that "a presumption of negligence cannot be based on mere theories or *by simple deduction from other presumptions* * * *." (Italics ours.) The quotation from Thompson's Commentaries on the law of negligence found in this case relative to an accident which implies negligence would apply of course to a res ipsa loquitur action. Such is not the nature, however, of the instant suit. *In the case at bar* there is no evidence, substantial or otherwise—that contradicts the direct evidence introduced. *Bock v. Fellman Dry Goods Co., 212 S. W. 635* recognized that "The evidence must present something more than mere conjecture or surmise" and held that the testimony did so. The evidence showed the accident could have hapened in but two ways and that the defendant would have been liable in either event. *Burlington R. I. Ry. Co. v. Ellison, 140 Tex. 353, 167 S. W. (2d) 723; Lockley v. Page, 180 S. W. (2d) 616; Stephens, et al. v. Karr. 33 S. W. (2d) 725* each present an entirely different factual situation to the case at bar. In each case there was clearly evidence of a probative nature involved. Cer-

tainly none of them contravene the well settled law of Texas followed by the Honorable Circuit Court of Appeals for the Fifth Circuit in rendering its decision in the instant case.

It is therefore respectfully submitted that this case is not a proper one for review by certiorari in this Court, and that the petition for a writ of certiorari should be denied.

Dated September 17, 1947.

Respectfully submitted,

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